Diva, Ltd. *and* Janice Friedman. Case 2–CA–28189

May 22, 1998

DECISION AND ORDER

BY MEMBERS FOX, HURTGEN, AND BRAME

On April 29, 1997, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed cross-exceptions, a supporting brief, and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

The judge found that Charging Party Janice Friedman was an employee of the Respondent and that the Respondent violated Section 8(a)(1) by terminating Friedman in January 1995 because she had engaged in protected concerted activities. The Respondent excepts. It argues that Friedman is an independent contractor and not an employee within the meaning of Section 2(3) of the Act. Alternatively, the Respondent contends that, even if Friedman were an employee, she left voluntarily and was not discharged. For the following reasons, we find merit in the Respondent's contention that Friedman voluntarily severed her relationship with the Respondent. Accordingly, we shall dismiss the complaint.[2]

The relevant facts are fully set forth in the judge's decision. Briefly, the Respondent operates and manages an all-women jazz band, ''Diva.'' Beginning in the fall of 1993, Friedman, a jazz pianist, performed in all of Diva's gigs. In mid-1994, during a Florida band tour, Friedman spearheaded meetings where she and other Diva musicians complained about various working conditions. The Respondent knew of these meetings and of Friedman's participation in them. The Respondent's founder and artistic director, Stanley Kay, testified that he considered firing Friedman in Florida because she was ''causing dissension in the band.'' Notwithstanding this, however, the Respondent continued using Friedman as Diva's pianist in all subsequent gigs.

In late December 1994, the Respondent invited Friedman to perform in a California band tour. The Respondent considered the California tour extremely important because Diva's scheduled performance at a jazz educators' convention would heighten the band's visibility.

In preparation for the California tour, the Respondent offered Friedman and other invited musicians a written ''contract.'' This contract was the first written agreement the Respondent had used with the musicians. The contract specified, among other things, the schedule of the California performances and rehearsals, lodging and transportation arrangements, and band remuneration. The contract also specified that the band would depart for California on January 9, 1995, and that interested musicians had to sign and return the contract to the Respondent by January 4, 1995, if they wished to participate in the tour.

After receiving the contract, Friedman informed two Diva musicians that she was dissatisfied with some of its terms, as well as other working conditions. Friedman told these musicians that she planned to write the Respondent about her concerns. On January 4, Friedman faxed a letter to Stanley Kay, listing several areas of dissatisfaction and demanding specific changes. Some of Friedman's demands addressed her individual concerns, such as that her piano be adequately amplified, that she be provided extended solos, and that she be guaranteed ''first calls'' for all 1995 gigs. Other demands in the January 4 letter affected Diva musicians generally, such as rehearsal and break schedules, compensation, band meetings, and lodging on the California tour. Regardless of whether the enumerated demands affected Friedman individually, or band members generally, however, Friedman made clear in the January 4 letter that she, alone, was making the demands. Thus, after specifying her demands, Friedman wrote Kay that this is ''between you and me.''

It was likewise clear that the January 4 letter constituted an ultimatum from Friedman to Kay that unless her specified conditions were met Friedman would sever her relationship with the band. Thus, Friedman concluded the letter by informing Kay that:

> I hope [this letter] will be accepted by you and signed and returned to me sometime on Jan. 5th. . . . If you decide this is to [sic] much for you, then I wish you great luck with the band, and I will always know that I stood up for women having a voice.

Upon receipt of the letter, Kay immediately contacted Diva bandleader (and drummer) Sherry Maricle. Kay expressed anger over Friedman's letter and told

[1] The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Because we agree that the Respondent did not discharge Friedman, we find it unnecessary to pass on the Respondent's alternative argument that Friedman was an independent contractor rather than an employee. And, because we do not pass on that issue of status, we do not pass on whether Friedman's activity was within the ambit of Sec. 7 conduct.

Maricle he felt he was being ''blackmailed'' into accepting Friedman's terms because of the band's imminent departure for California. Maricle also expressed anger over Friedman's ultimatum. After Kay and Maricle had decided that Friedman's demands could not be met, Kay contacted Lolly Bienenfeld, a Diva musician who handled certain band administrative matters. Kay instructed Bienenfeld to notify Friedman that the Respondent would not meet her conditions and that it would find another pianist for the California tour. Bienenfeld left this message with Friedman on January 5.

On January 6, Friedman telephoned Kay, asking which of her demands he could not meet. According to Friedman's credited testimony, Kay responded that he ''didn't understand any of it . . . [and] didn't want to talk about any of it.'' When Friedman pushed Kay about two specific demands—rehearsals and lodging—Kay reiterated that ''I don't understand any of it and I don't want to talk about it. You've been a problem since the beginning.'' Kay also disputed Friedman's claims that band members were afraid to raise these concerns to him, stating, ''[Y]ou're the only one that's scared. I have 12 loyal people.'' Friedman concluded the conversation stating, ''Well, okay.'' Thereafter, Friedman never informed the Respondent, prior to or after the California tour, that she had rescinded the demands set out in her January 4 letter.

Contrary to the judge, we find that Friedman voluntarily ended her relationship with Diva by conditioning her willingness to continue performing with the band on the Respondent's acquiescence to the ultimatums set forth in her January 4 letter. In the letter, Friedman clearly indicated that unless her conditions were met, she intended to part ways with the band. The Respondent—as it was lawfully privileged to do—responded to the letter by informing Friedman that it could not meet her demands and that a replacement would be found for her for the California tour. We note that although Friedman called Kay the following day and attempted to question him as to which of her demands the Respondent could not meet, she did not indicate in that conversation that any of her demands had been withdrawn. Neither did she at any subsequent time inform the Respondent that she would be willing to resume playing with the band without those demands being met. Accordingly, we reverse the judge's finding that the Respondent terminated Friedman in violation of Section 8(a)(1) of the Act. See *Albertson's Inc*., 307 NLRB 787, 796–797 (1992) (employee voluntarily quit when she was told by company management that her demand for a wage increase would not be met).

ORDER

The complaint is dismissed.

Ian M. Penny, Esq., for the General Counsel.
William E. Zuckerman and *Jamie Levitt, Esqs.*, for Respondent

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. This case was tried in New York, New York, on February 6 and 7, 1997. The charge was filed February 13 and amended May 25, 1995, and the complaint was issued June 28, 1996.

The complaint alleges and Respondent denies that Charging Party Janice Friedman was terminated on or about January 5, 1995, because she engaged in concerted activities protected by Section 7 of the Act. As an affirmative defense, Respondent asserts that Friedman was an independent contractor and not an employee. Respondent further asserts that the Charging Party voluntarily severed her association with Respondent and was not terminated.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent Diva, Ltd. admitted in its answer that it is a corporation engaged in the operation and management of a jazz band. The parties stipulated that in 1994, during the period relevant to the complaint, Respondent directly earned $45,000 in interstate commerce and at least $5000 from performing services for Tavern on the Green, an entity which the parties stipulated meets a Board standard for assertion of jurisdiction other than indirect inflow or indirect outflow.[1] Respondent nevertheless denies that the Board has jurisdiction over Respondent, arguing that it is not an ''Employer'' because of its position that band members are independent contractors rather than employees. Respondent also asserted as an affirmative defense that the Board should decline jurisdiction in this case because its activities have a de minimus impact on interstate commerce.

The facts stipulated by the parties establish that Respondent's business operations ''affect commerce'' within the meaning of Section 2(7) of the Act. *Marty Levitt*, 171 NLRB 739 (1968). Moreover, because of the nature of Respondent's business, selling its services to commercial enterprises such as restaurants, casinos, and the New York Yankees, rather than directly to the ultimate consumer, as in a ''club date,'' the Board's nonretail standard for assertion of jurisdiction

[1] Respondent's adjusted trial balance for 1994, received in evidence on another issue, reflects gross revenues in excess of $100,000 and income from Tavern on the Green far in excess of the $5000 stipulated.

applies. Respondent's operations meet that standard. It is thus subject to the Board's jurisdiction. Id.

Respondent's argument premised on its assertion that band members are independent contractors is without merit based on my finding below that band members are employees of Respondent. Accordingly, it is found that Respondent is an Employer within the meaning of the Act, subject to the Board's jurisdiction.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Employee Status of Charging Party*

Respondent was formed in 1992 by Stanley Kay, a veteran jazz musician and manager, Sherry Maricle, a drummer, and John LaBarbera, a musical arranger, to give women jazz musicians a forum to perform and to serve as a role model to young women interested in performing jazz. Kay holds the title of artistic director. He serves as the band's manager and is responsible for securing engagements, or ''gigs,'' where the band can perform. He receives no compensation from Respondent for his services. Maricle holds the title of bandleader and serves as the conductor and musical director. LaBarbera, whose involvement with the band has waned since its founding, also held the title of musical director and was responsible for selecting and arranging the music that the band would perform. As his involvement has declined, Maricle has assumed these latter responsibilities. Both Maricle and LaBarbera were responsible for recruiting and hiring the musicians who played with the band at its inception. More recently, Maricle has become solely responsible for selecting musicians. In addition to these individuals, Respondent employs a road manager, Shaun Whitaker, who is responsible for arranging transportation of the band and its equipment to gigs and setting up for the performances, and a personnel manager, Lolly Bienenfeld, who performs clerical chores and communicates offers of employment and information regarding gigs to individual band members. Bienenfeld is also a musician who has played with the band since its inception. Respondent has admitted that Kay is an agent of Respondent. The evidence establishes that Maricle is also an agent of Respondent with respect to its dealings with the musicians. There is no allegation that either Whitaker or Bienenfeld are supervisors or agents of Respondent.

The testimony of Maricle and Kay reveals that when an engagement or ''gig'' is booked by Respondent Maricle decides which musicians would be appropriate for that engagement and will offer the gig to the musicians selected. If the musician has a conflict, she may decline the offer without foreclosing future opportunities to play with the band.[2] The Band consists of 15 musicians. Although not always the same 15 musicians, it is undisputed that, over time, a core group has become identified as ''Diva.'' Respondent's general ledger, showing payments to musicians during 1994, shows that approximately 12–13 musicians were paid for every performance in 1994. Maricle herself, who is responsible for hiring the musicians for each engagement, testified that it would not be beneficial to have 15 different members each time the band performs, for obvious reasons. The variation that exists among band members from performance to performance is based on factors such as availability of the musicians and the type of engagement. Maricle testified that she also liked to rotate new musicians through the band so that they could learn the bands repertoire. This would increase the pool of musicians who could readily substitute for regular band members who were unavailable for a particular gig.

Maricle and Kay determine how much to pay each musician for the gig, whether a rehearsal is necessary, and the time, duration, and location of the rehearsal and the compensation for the rehearsal. At the rehearsals, Maricle determines when to take a break and whether additional rehearsal time is needed at the end of the scheduled time. Respondent arranges transportation to the gig, including transportation of the larger instruments. Respondent also pays transportation to New York for musicians who live in other parts of the country, such as Audrey Morrison and Lee Kavanaugh.

Maricle and Kay determine what music to play at each engagement. Maricle also determines who will play solos and the length of the solo, although, due to the improvisational nature of jazz, the individual musician devises her own solo within the context of the piece being played. Respondent hires and pays for musical arrangements and provides each band member with a score book of such arrangements. Respondent owns the score books and retains them in between rehearsals and engagements. There is uncontradicted testimony that Kay has told individual band members to ''play like Ray Brown [or] Duke Ellington [or] Count Basie.'' When Respondent recorded a CD, in May 1994, Kay negotiated with a record company. When these negotiations were unsuccessful, he decided to produce the CD himself, selecting the recording studio and paying the costs of producing the recording. He and Maricle determined what arrangements to record and whether to do another take after each piece was recorded. Kay and Maricle also determined the amount of compensation each musician would receive for performing at the recording session. There is no evidence that individual band members were expected to share in any profits from the sale of the CD.

The General Counsel offered into evidence, without objection, a series of memoranda written by Maricle and distributed to band members providing detailed itinerary and instructions as to upcoming engagements, including instructions regarding what musicians will wear at performances. Some of these memos refer to ''off days'' between rehearsals and performances. According to Maricle, these memos were distributed to those musicians who had committed to play the engagements listed. Some of the memos also provide information regarding recording plans, tentative future engagements, and usually end with a note of appreciation for the musician's efforts and an exhortation to stay with the band. In addition to these written instructions, Kay also held band meetings at which he reviewed the band's performance and gave instructions as to smiling, bowing, looking at the soloist during performances and other details related to how the band presented itself on stage. Respondent has provided articles of clothing to band members to wear at performances

[2] Although the General Counsel's witnesses, Friedman and Terry, testified that band members would be penalized if they turned down an engagement by not being called again, in actual practice, musicians did occasionally decline engagements while continuing to play with Respondent.

and utilizes music stands with the Diva logo that are transported to rehearsals and performances.

There is no dispute that Respondent does not have an exclusive arrangement with band members. Musicians are free to play with other groups and in fact do. This is primarily due to the fact that Respondent is not yet successful enough to enable an individual band member to support herself solely through its engagements. The individual band members identify themselves as ''self-employed'' for tax purposes, carry business cards, and many of them also teach private students. Except for Friedman, the pianist, the band members use their own instruments. The piano used by Friedman is usually provided by the venue, i.e., the rehearsal hall, recording studio or performance site, although Respondent did rent a piano for Friedman during a concert tour to Florida.

There is no dispute that musicians are paid a flat fee per rehearsal or engagement, without regard to the length of time the musicians are required to perform and that the fee is unilaterally determined by Respondent based on how much Respondent is paid for the engagement. No taxes are withheld or benefits provided, although Respondent does pay for travel expenses when the band is on the road, or when a musician is brought in from out of town to play with the band, as in the case of Lee Kavanaugh. With one exception, Respondent and individual musicians did not execute written contracts or agreements setting forth the terms of their relationship, although Maricle's memoranda did establish the terms of engagements and apparently formed the basis of an oral agreement for those musicians who accepted the engagements identified in each memo. The one exception relates to a trip to California in early January 1995 and will be discussed in more detail, infra, as it relates to the termination of the Charging Party.

The testimony of Respondent's witnesses Kay and Maricle that there was no guarantee of future employment for individual band members is inconsistent with testimony from these and other witnesses that a band member could decline an engagement without jeopardizing future employment. Similarly, Kay's testimony that no member of the band had a right to be ''first call'' for a gig is contradicted by Maricle's testimony that in fact there were a group of musicians she would call first and hope that they were available. Although Respondent may have been a part-time band at its inception, Respondent concedes in its posthearing brief that the goal was to become successful enough to be a full-time band with fixed members. Thus, it is clear that, from Respondent's perspective, there was an expectation of continued employment for those band members who had demonstrated the level of skill and talent desired by Maricle and Kay.

Respondent's witnesses testified that while Maricle might select the music to be played at an engagement and makes other decisions regarding how the music is played, she and Kay do so after input from band members. For example, the record indicates that many members, including the Charging Party, were unhappy with the band's founding arranger, John LaBarbera and expressed this unhappiness to Maricle. Because of their concerns, Respondent stopped using LaBarbera. There is also evidence that, following a concert tour to Florida and as a result of concerns expressed at a meeting of band members to be discussed in more detail, infra, weekly voluntary rehearsals were held in October and December 1994 for which no fee was paid to the members. This input from band members, in the nature of creative collaboration, does not establish independent contractor status where Respondent makes the final decision regarding all aspects of its enterprise.

The question whether an individual is an employee entitled to the protections of the Act or an independent contractor excluded from coverage is to be decided by assessing the total factual context in light of the pertinent common-law agency principles. *NLRB v. United Insurance Co.*, 390 U.S. 254, 258 (1964). The right to control test, i.e., whether the one for whom services are performed retains the right to control the manner and means of achieving the result sought, or only retains control as to the ultimate results, has often been cited as foremost among these principles. *Roadway Package System*, 288 NLRB 196 (1988); *News Syndicate Co*., 164 NLRB 422, 423–424 (1967). However, there are other relevant factors under the common-law of agency that must also be considered as pertinent to the facts in a given case. The Board has identified the following additional factors: whether the one employed is engaged in a distinct occupation or business; whether the employer or the one employed supplies the instrumentalities, tools, and place of work for the job; the length of time for which the individual is employed; the method of payment (by the job or by time); whether the work to be performed is part of the regular business of the employer; whether the parties believe they are creating an employer-employee relationship; and whether the employer is or is not in business. *Puerto Rico Hotel Assn*., 259 NLRB 429 (1981), enf. denied sub nom. *Hilton International Co. v. NLRB*, 690 F.2d 318 (2d Cir. 1982); *Young & Rubicam International*, 226 NLRB 1271, 1272 (1976). The Board has also considered the degree of entrepreneurial risk borne by the putative employee/contractor as a relevant factor. *DIC Animation City*, 295 NLRB 989, 991 (1989); and *Mission Foods Corp*., 280 NLRB 251 (1986). The resolution of this issue is a question of fact and no one factor is determinative. *News Syndicate Co*., supra at 423–424.

The issue in this case is a close one as there are factors tending to support either a finding that the Charging Party was an employee or that she was an independent contractor. For example, the lack of exclusivity in the arrangement between Respondent and individual band members; the method of payment (a flat fee per engagement without regard to time); the fact that all band members except the Charging Party supply their own instruments and that band members are selected based on their talent and experience would suggest that they are independent contractors. *DIC Animation City*, supra; *Young & Rubicam International*, supra, and cases cited therein. The musicians' freedom to decline an engagement and the lack of any restriction on outside work also support a finding of independent contractor. *Boston After Dark*, 210 NLRB 38 (1974); *Century Broadcasting*, 198 NLRB 923 (1972). Similarly, the right to control test, as applied to artists, permits some degree of control over what at first glimpse might appear to be the means and manner of achieving results by the party hiring the artist without rendering the hired artist an employee. *DIC Animation City*, supra; *Young & Rubicam International*, supra; *Boston After Dark*, supra; *Musicians Local 16 (Greater Newark)*, 206 NLRB 581 (1973), affd. 512 F.2d 991 (D.C. Cir. 1975).

On the other hand, Respondent's control over where, when and for how long the band members will rehearse and per-

form; the music to be played, the instruments to be used, and who will solo and for how long; Kay's instruction to individual band members to play in the style of certain well-known jazz musicians; Respondent's unilateral determination of the fee each musician will receive; the continuity of employment of most of the musicians in the band, and the fact they have become identified with Respondent all suggest that they are employees rather than independent contractors, at least during those times when they are hired by Respondent. *Musicians (Royal Palm Theater)*, 275 NLRB 677, 681–682 (1985); *Puerto Rico Hotel Assn*., supra;[3] *Castaways Hotel*, 250 NLRB 626, 642–644 (1980); *Reno Musicians Protective Union, Local 368*, 170 NLRB 271 (1968).

The most significant factor that tips the balance in favor of a finding that the Charging Party and other band members are employees is the lack of entrepreneurial risk to band members while working for Respondent. This is what distinguishes them from the animation writers, photographers and other creative artists found by the Board to be independent contractors in *DIC Animation City, Young & Rubicam*, and other cases relied on by Respondent. Although the individual members of the band may take entrepreneurial risks in their individual music projects as solo performers, leaders of their own combos or music instructors, clearly there are no risks involved while employed by the band. They are paid the fee unilaterally determined by Respondent for each rehearsal, engagement or recording session, and are compensated for travel and lodgings, even if Respondent loses money on a gig. Diva bears the expenses of getting the band to its performances, pays for rehearsal space, and even rents instruments for musicians when necessary. Moreover, when recording a CD with the expectation that it would be marketed and sold as any recording, the band members were paid ''scale,'' a flat fee, and were not expected to share in any profits realized from sales of the recording. While employed by Diva, charging party and the other musicians bear few of the risks and enjoy little of the opportunity for gain normally associated with an entrepreneurial enterprise. *Roadway Package System*, supra; *Castaways Hotel*, supra at 644. In contrast, the animation writers, photographers, and other creative artists found by the Board to be independent contractors expend a considerable amount of time and effort in submitting work to the ''employer'' without any guarantee their work will be accepted or that they will recoup all their expenses.

The Board's decision in *Boston After Dark*, supra, also relied on by Respondent, would at first glance appear to establish the nonemployee status of artists like Respondent's musicians who retain the discretion to refrain from performing work for an employer. In that case, the Board found freelance contributors to a weekly newspaper to be independent contractors rather than employees even though some of the contributors possessed many of the indicia of employee status, e.g., their work was subject to editorial control by the employer; they used the employer's facilities to do their work; regularly contributed work to the employer and derived most if not all of their income from such work. A majority of the Board based its finding on the no-work/no-pay arrangement, lack of fringe benefits, and the freedom of the contributors to refrain from contributing material in any given week without jeopardizing future work. While these factors appear similar to the arrangement of the musicians and Respondent here, there is one significant difference. The contributors to the newspaper controlled their product, i.e. they determined what to write, how much time to spend writing, where to write, etc. The musicians here perform with Respondent at the times and places determined by Respondent, the music they perform is determined by Respondent and their individual creative expression is integrated into a group product.

Respondent's reliance on the outside activities of individual band members and the lack of regularity of employment by Respondent is misplaced. In determining the status of an individual as an employee or independent contractor, it is the relationship between the individual and the putative employer which is dispositive. The fact that an individual may work for more than one employer, or may only work part-time does not establish that they are independent contractors. Even individuals who are clearly statutory employees may hold two or more jobs or work on a casual, temporary, or part-time basis without losing their employee status.

This case is more closely analogous to *Musicians (Royal Palm Theater)*, supra. The musicians hired by the theater in that case to produce a recording for use in the theater's productions were utilized only for a few hours with no expectation of future employment. The Board adopted the administrative law judge's finding that they were employees of the theater even though the theater did not directly hire or pay the musicians. The judge emphasized the degree of control exercised by the theater's music director over the details of the recording, control similar to that exercised by Maricle and Kay in the instant case. Respondent argues that this case is of limited precedential value because the issue was whether the respondent union had violated Section 8(b)(1)(B) by filing internal union charges against the theater's director. However, the finding that the musicians were employees and that the director was acting as their supervisor at the recording was an essential element leading to the finding of a violation. Thus, the judge's finding as to employee status was more than mere dicta.

Respondent's argument that the issue of the employee status of freelance musicians in a band context is one of first impression is erroneous. In *Musicians Local 16 (Greater Newark)*, supra, a secondary boycott case, the Board adopted the administrative law judge's finding that musicians were employee's of band leaders who performed in a restaurant, even though the musicians, referred to by the judge as sidemen, had other employment. While there are factual differences between that case and the instant one, the relationship of musicians to orchestra leaders, in terms of the control exercised by the leaders over the music to be performed by the band, is similar and establishes the employee status of the musicians here.

Accordingly, based on an evaluation of all the factors present here, a preponderance of the evidence establishes that the Charging Party and the other musicians who perform

[3] In *Puerto Rico Hotel Assn.*, supra, the Board found that hotels were the employers of club and lounge bands hired to perform in the hotels. The Court of Appeals, in denying enforcement to the Board's Order, found that the band leaders were independent contractors and that the musicians were employees of the band leaders, not the hotels. *Hilton International Co. v. NLRB*, supra at 321–322. The nature of the relationship between the band leaders and musicians there bears many similarities to that between Respondent and the musicians here.

with Respondent are employees within the meaning of the Act.

B. *Termination of Janice Friedman*

Friedman is a jazz pianist who first played with Respondent at a gig in Atlantic City in July 1993. Friedman testified without contradiction that Kay and Maricle told her at that time that they liked her playing and would like her to join the band but they already had a pianist. Several months later, in October 1993, Friedman was asked to join the band and there is no dispute that she played every one of Respondent's gigs from that point through the end of 1994.

The alleged concerted activity began after the recording session in May 1994. Friedman testified that the session lasted longer than scheduled and that she and several other musicians went out for a drink afterward, ending up at the home of band member Ingrid Jensen. Friedman and the four other musicians who were with her (Jensen, Elaine Burt, Audrey Morrison, and Clare Daley) were upset about the way the recording session had gone and, in particular, the role of LaBarbera at the session. According to Friedman, the musicians felt that LaBarbera had taken over the session and treated Maricle disrespectfully. While at Jensen's house, they telephoned Lee Kavanaugh, another musician, and Maricle and spoke to them over a speaker phone, airing their concerns. According to Friedman, Maricle shared their concerns regarding LaBarbera. Friedman testified that the musicians at Jensen's house and Maricle discussed having a band meeting during their upcoming Florida tour.[4]

During the Florida tour, the band held a rehearsal, outdoors on a pier under a pavilion, under less than ideal conditions. At the end of the time scheduled for the rehearsal, Maricle said she wanted to continue rehearsing, which did not please some of the musicians. Mary Ann McSweeney, the bass player who testified at the hearing, asked to be excused from further rehearsals because she wasn't feeling well. She was permitted to leave. At the conclusion of the extended rehearsal, Kay told the band members he wanted to have a meeting. This request engendered some complaints from the musicians, including Friedman, who asked Kay if the meeting was something that could be handled quickly so that the musicians could have the rest of the afternoon to themselves. According to Friedman, Kay became irate at her suggestion, but in response to band members complaints, he agreed to take a 45-minute break so they could get something to eat before meeting.[5] According to Friedman, Kay's meeting lasted 1-3/4 hours, during which Kay asked each member of the band why they wanted to be in Diva. McSweeney corroborated Friedman. Kay, the only witness for Respondent to testify about this meeting, said he held the meeting to air things out, to ask the band members what it meant to them to be in Diva, to find out if they had the same goals. According to Kay, he also wanted to make sure the members understood his role and background, that he understood their concerns because he had been in a band himself and to let them know that he was doing all he could to make things better.

A day after Kay's meeting, the band members held their own meeting. This is the meeting which had been discussed in Jensen's house. According to Friedman, although the meeting may have been Maricle's idea, Maricle told Friedman before the band left New York that she would not attend the meeting because she was part of management. Maricle testified that she did not attend the meeting because she had heard through the grapevine that the meeting was going to be a negative, unproductive ''bashing '' session with members complaining about things she had no control over. Several other band members did not attend the meeting.

In preparation for the meeting, Friedman had typed out an agenda. This document is entitled ''Organization of Diva Union'' with ''Union'' crossed out and ''Musician Committee'' handprinted in its place. According to Friedman, Audrey Morrison crossed out the word union because she felt people would be threatened by that word. The agenda included organizational items, such as voting for leaders and ''reps to Stanley'' and having the ''treasurer . . . check union scales''; a ''suggestion'' that ''once we have our personell [sic] list we will not let someone be fired without us knowing why and voting on it''; a list of financial concerns, including pay for gigs and rehearsals and expense reimbursements; and a list of ''Stanley concerns'' which included meetings, threats to band members and musical comments to band members. Friedman testified that this document was handed out at the meeting, a fact corroborated by Sue Terry and Respondent's witness Laura Dreyer.

The testimony of those witnesses who were at the meeting, including Friedman, reveals that, despite having such a detailed agenda, the meeting lacked any organization. Instead, the musicians who were present went around the room, expressing their concerns which were recorded on a blackboard and in handwritten notes by several people, including Friedman. The concerns discussed and written down were similar to those identified in Friedman's prepared agenda. Apparently no leaders or representatives were elected and no plans made to followup the meeting with any group action. In fact, according to the Charging Party Friedman, the musicians at the meeting specifically rejected the idea of circulating a petition or approaching Kay and Maricle as a group. Instead, individual musicians would each discuss one or two concerns with either Maricle or Kay. Friedman and Terry testified that there was a second meeting while the band was still in Florida and that the main topic at this meeting was the rumors that Friedman was going to be fired by Kay for speaking up about Kay's scheduling a meeting after the rehearsal. The band members who were at this meeting discussed ways they could show their support for Friedman.

There is no dispute that Kay and Maricle were aware of the band meetings as they occurred. The General Counsel offered evidence to establish that Kay was hostile to the fact that such a meeting occurred and directed this hostility toward Friedman. Thus, Friedman testified that Kay said to her, in the presence of Burt, ''if you all want a band meet-

[4] Of the musicians who were with Friedman, only Daley testified, as a witness for Respondent. She was not asked about this incident. Maricle did testify about her side of the telephone conversation and corroborated Friedman regarding the concerns expressed by the musicians about LaBarbera's role with the band. Maricle testified that it was her idea to have a meeting in Florida, to discuss musical issues. Friedman acknowledged that the meeting may have been Maricle's idea.

[5] Kay admitted calling a meeting after the rehearsal because of ''unrest'' in the band, but he did not testify to any exchange with Friedman regarding the scheduling of the meeting.

ing, I'll throw the band in the river.''[6] According to Friedman, on another occasion, while still in Florida, Kay told her he loved her playing and that as long as she could keep her mouth shut, she'd be fine. Friedman testified further that, in this same conversation, Kay reviewed other band members who had been fired and the reasons. However, when asked specifically what Kay said about this, Friedman could only recall one person mentioned by Kay and that person was fired for musical reasons, not for being outspoken. McSweeney testified that she heard rumors while in Florida that Kay wanted to fire Friedman, but she could not recall any specifics. McSweeney testified that she spoke to Maricle about these rumors and asked Maricle to speak to Kay. Terry testified that she was witness to a conversation in which Kay was very upset about the fact there had been a meeting, but she also could not recall any details of the conversation.

Kay acknowledged having a conversation with Friedman in Florida. According to Kay, he told Friedman he wanted to clear the air, that he didn't know what was bothering her but, whatever it is, he hoped she would give him her best musically. He also told Friedman that to show his faith in her, he would have an arrangement done for her and asked for suggestions of music she would like to play. Friedman conceded on cross-examination that Kay did have an arrangement composed especially for her. At the hearing, Kay at first denied he contemplated firing Friedman while the band was in Florida. However, when confronted with an affidavit he gave during the investigation of the underlying charge, Kay admitted he considered releasing Friedman because of ''events in Florida.'' When asked for specifics, Kay testified that Friedman was causing tension and problems in the band and that he was particularly upset that she ordered room service delivered during the meeting he had called after the rehearsal. Kay further testified that other band members did approach him in Florida and asked him to give Friedman another chance. According to Kay, this is the reason he met with Friedman to ''clear the air.''

Upon returning to New York, Maricle distributed a memo to band members, dated June 3, 1994, in which, inter alia, she addressed some of the issues raised at the band meetings which had been brought to her attention. She concluded this section of the memo as follows:

> Do not feel insecure regarding your position in Diva. If you do your job welland agree to the given circumstances and have the best interest of the band at heart, there won't be a problem. Please feel free to discuss any topic with Stanley or me, if it concerns making ''things'' better. Please Think constructively, not destructively.

Maricle testified that she heard from as many as ten members about the meeting, but not from Friedman, contradicting Friedman's testimony that she spoke to Maricle about the band's concerns regarding rehearsals, making the suggestion for voluntary weekly rehearsals, a suggestion which was adopted. Maricle was evasive when asked for specifics by the General Counsel regarding who spoke to her about the meetings, what they said and what led her to write the June 3 memo. Maricle acknowledged that complaints about pay for gigs, an issue at the band meetings, was one of the concerns she felt were ''destructive.''

It appears from Friedman's testimony that nothing further of a concerted nature occurred until November 1994.[7] According to Friedman, at that time, during a gig in Atlantic City, Kay called another band meeting late at night after a performance, which upset some of the musicians. Kay told the musicians that an upcoming California tour was very important to the band and that Respondent would be auditioning for subs. Although at first testifying that Virginia Mayhew was not present for this gig and meeting, Friedman testified that Mayhew spoke up about Kay's plan to audition subs. Friedman testified that Mayhew said she had a cruise ship job which conflicted with the California tour and did not like having her position with the band threatened because of one job. Friedman then spoke up and said that people who had been in the band from the beginning and shown their loyalty should not be threatened because they couldn't make one gig. According to Friedman, Kay responded that no one felt threatened and then went around the room asking each band member if she felt threatened. Friedman testified that she told Kay that she had felt threatened in Florida and that Kay and Maricle responded that Friedman had a bad attitude in Florida. No other witness testified regarding this meeting.

Friedman also testified that, after the Atlantic City gig, Respondent held auditions for subs in the presence of band members, during a rehearsal. After this rehearsal, Kay showed the band members the CD that had been recorded in May. The picture of the band on the cover of the CD was not the same band that had recorded the CD. Moreover, pictures purporting to be those of individual band members inside the CD were of musicians who no longer played with the band and were not present for the recording. According to Friedman, those members who were on the recording but not pictured were upset. Friedman testified that she spoke up and asked Kay: ''What did you think . . . this band was better looking than our band?'' No other witness testified about this incident.

On New Year's Eve, 1994–1995, during a gig at Tavern on the Green, the band members were given contracts for the California tour. As noted above, this was the first time a written agreement was used by Respondent. The agreement included the itinerary for the California tour which generated some complaints among band members because of the distance between the hotel in Palm Springs and rehearsals and engagements in Los Angeles. According to Friedman, there was a ''buzz'' among the musicians at Tavern on the Green about this issue. Terry and McSweeney corroborated Friedman regarding the fact that band members were unhappy with the accommodations and itinerary and discussed this complaint amongst themselves. McSweeney testified that she also complained about this to Whitaker, who is not alleged to be a supervisor or agent of Respondent.

The ''Agreement'' for the California tour distributed to band members was supposed to be returned to Kay, signed, by January 4, 1995. Friedman testified that between New

[6] Burt did not testify.

[7] McSweeney testified that she called the musicians' union within 2 weeks of returning to New York from the Florida tour and that she spoke to other band members about this. There is no further mention of the Union in the record. Apparently, McSweeney's efforts were not pursued. Friedman did not testify about any union organizing efforts.

Year's Eve and January 4 she spoke to McSweeney, Terry, Burt and Jensen, in separate telephone conversations, and that she discussed with these other band members the general unhappiness with the issues which had been the subject of earlier meetings and discussions and specific complaints about the travel arrangements and number of rehearsals on the California tour. Friedman testified that she told McSweeney and Jensen that she was going to write a letter to Kay about these concerns. McSweeney corroborates Friedman regarding this conversation and testified that she told Friedman, on hearing of her plans to write a letter, ''if you do, you'll probably be fired.'' Terry also testified to a telephone conversation with Friedman in which Friedman said she was going to fax a letter to Kay.

There is no dispute that Friedman faxed a letter to Kay on January 4. In this letter, after several opening paragraphs in which she reviews her relationship with Kay and the band and their respective contributions toward making the band a success, Friedman wrote the following:

> To make a long story short there are things that I would like clear and in writing and signed by us both sometime Jan. 5th. Some things have not sat well with me or many of the others in the band. I know that we can correct it so that the band will be truly what it is meant to be.

Friedman then lists six areas of concern:

> 1. rehearsals;
> 2. band meetings;
> 3. ''I want to know that I will be first call for all Diva gigs from now through the end of the year. I do not want to feel threatened that if I say anything or miss a rehearsal or one gig, I will lose my chair, because I have already put in very much for the sake of the band and deserve the same loyalty that I've shown. If I am to do this tour, I need to know that I will be first call for all Diva gigs this year.''
> 4. Amplification of the piano and her need for one extended solo per set;
> 5. The picture on the CD;
> 6. The travel arrangements for the California tour, including her desire that the ''unnecessary commute'' and three rehearsals on gig days be changed.

Friedman concluded the letter with the following paragraph:

> Stanley, this letter I hope will be accepted by you and signed and returned to me sometime on January 5th. It's between you and me. If you want an honest person, with backbone, who wants to say what she deserves and get it (and you can hear that in the way I play), then please consider the reality of the things I've said and what this band should be striving for. We must be able to speak out or this band full of women will be taking the meek role that women have always been expected to take. If you decide this is to much for you, then I wish you great luck with the band, and I will always know that I stood up for women having a voice. Please sign and return this to me . . . so that I might join you and give it my loving all in California next week, and although underpaid, know that we will be treated as well as possible and like the professionals we are.

Kay and Maricle testified that upon receiving this letter, Kay called Maricle in Japan, where she was performing independently of Diva, and read her the letter. Kay testified that he felt ''blackmailed'' because of the timing of Friedman's letter, a few days before the band was scheduled to leave for California, and the short time she allowed for Respondent to agree to her terms. Maricle admitted being angry that Friedman sent this letter, which she interpreted as an ultimatum. Both Kay and Maricle testified that they were unaware that Friedman was acting on behalf of, or with the authorization of, any other band members, citing Friedman's use of the following sentence: ''It's between you and me.''[8] After discussing Friedman's ''demands,'' which Kay and Maricle testified could not be met on such short notice, Kay instructed Bienenfeld to call Friedman and tell her that Respondent could not meet her list of demands and that they would find a replacement for her for the California tour. Bienenfeld left a message to this effect on Friedman's answering machine on January 4.

Friedman testified that she called Kay the next morning and told him that she had received the message from Bienenfeld stating that he could not meet her demands. Friedman asked Kay what it was that he couldn't meet. According to Friedman, Kay responded, ''I don't understand any of it. I don't want to talk about it.'' Friedman testified that she then asked Kay specifically about each of her points in the letter, i.e., the rehearsals, the meetings, etc., and that he responded, each time: ''I don't understand any of it. I don't want to talk about it.'' Kay told Friedman, ''You've been a problem since the beginning.'' Friedman finally said, ''Do you understand this is a band full of women and the women are scared to talk to you about these things.'' Kay replied, ''You're the only one that's scared. I have 12 loyal people.'' The conversation ended at this point. There is no dispute that Friedman was never called again to perform with the band.

Kay testified that he received a call from Friedman the day after receiving her letter. On direct examination, Kay testified that he merely told Friedman that he was sorry he could not meet her list of demands. On cross-examination, however, he acknowledged that he told Friedman he didn't understand her letter and said to Friedman: ''no more discussion.'' He also admitted telling Friedman that he would recommend her to other bands, but as far as he was concerned it was over. Kay explained at the hearing that he didn't understand Friedman's letter because he had never seen anything like it in his 50 years in the music business. He testified that he could not meet Friedman's specific demands on such short notice and that the reason she did not go to California is because ''she didn't want to go.'' Respondent offered no explanation for it's failure to call Friedman to perform with the band after the California trip. Friedman's name appears on the most recent roster of women musicians utilized by Respondent in selecting musicians for engagements.

[8] Respondent also offered the testimony of band members Bienenfeld, Daley, Dreyer, and Kavanaugh that Friedman did not discuss the letter with them before sending it and that they had not authorized her to write such a letter on their behalf.

McSweeney testified that she saw a copy of Friedman's letter as she was getting on the plane to California and that copies were being handed out by someone whom she could not recall. McSweeney further testified that Kay remarked that he was happy to have Friedman gone and that Friedman was a problem and complained and demanded too much. Kay did not deny making these statements.

Friedman's testimony was not entirely credible. As noted above, she gave an internally inconsistent account regarding an alleged meeting between Kay and the band in Atlantic City at which Virginia Mayhew, whom she first testified was not present, allegedly complained about lack of job security. Because there is no corroboration regarding this meeting, I find it did not happen. Similarly, Friedman's testimony regarding ongoing conversations and discussions among band members between the meetings in Florida and the date she wrote her letter to Kay lack corroboration except for two conversations she had with Terry and McSweeney shortly before she wrote the letter. I also find significant the General Counsel's failure to call Elaine Burt to corroborate Friedman regarding the conversation with Kay in Florida in which he allegedly said he would ''throw the band in the river'' if they wanted a band meeting. I therefore do not rely on this evidence in reaching the conclusions below.

The credibility of Respondent's witnesses, Kay and Maricle, was not much better. As noted above, their testimony on the issue of employee status, that musicians could reject an offer of employment without jeopardizing future offers while at the same time having no expectation of future employment and that no employees were entitled to ''first call'' when in fact there were at least 10–12 musicians who were always called first, was inconsistent. Kay's attempts to deny he considered firing Friedman in Florida were impeached by a pretrial affidavit. Both Kay and Maricle were evasive and nonresponsive when questioned by the General Counsel about their knowledge of alleged concerted activities of Respondent's musicians and Friedman in particular.

Despite these credibility issues on both sides and the lack of corroboration of some of Friedman's allegedly concerted activity, certain essential facts necessary to find a violation are clearly established in the record. Thus, there is no question that band members had group concerns related to their job security, pay, travel arrangements, rehearsal scheduling and other terms and conditions of employment with Respondent, which concerns were expressed at group meetings in Florida of which Respondent was aware. Maricle herself admittedly participated in the discussions with Friedman and the other musicians at Jensen's house which precipitated the band meetings in Florida. The meeting in fact was Maricle's idea. By her own testimony, Maricle did not attend the meetings because she had heard about the complaints to be discussed and felt they were destructive. Although she did so reluctantly, Maricle admitted being aware of what happened at the meetings, a fact confirmed by her June 3 memo to the musicians addressing some of their concerns. There is also no question that Kay bore animus toward the concerted activity in Florida and Friedman in particular. When confronted with his affidavit, he admitted that he considered firing Friedman because of events in Florida. He also testified that he called a meeting in Florida because of dissension in the band, obviously related to the fact the band members had called their own meeting. While the evidence regarding any ongoing concerted activity between the Florida tour and Friedman's letter is not persuasive, her testimony that she spoke to other musicians before writing the letter is corroborated by McSweeney and Terry, who were credible witnesses. The evidence also clearly establishes that Friedman's January 4, 1995 letter led directly to the termination of her employment with the band.

In *Meyers Industries*,[9] the Board established the test for determining whether an employee has been discharged for protected concerted activity under Section 8(a)(1) of the Act. In order to be found ''concerted,'' an employee's activity must be engaged in with or on the authority of other employees, and not solely on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity. Id. at 497. In the second *Meyers* decision, the Board explained, in response to the court's remand, that individual activity could still be found to be concerted under the new test if there is some demonstrable linkage to group action. The Board reiterated its position that an individual employee's actions seeking to initiate, or to induce or to prepare for group action, as well as an individual employee's bringing truly group complaints to the attention of management, will be found concerted. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. Id. at 886–887. See also *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). Since *Meyers*, the Board has found an individual employee's activities to be concerted when they grew out of prior group activity;[10] when the employee acts, formally or informally, on behalf of the group;[11] or when an individual employee solicits other employees to engage in group action, even where such solicitations are rejected.[12] However, the Board has long held that, for conversations between employees to be found protected concerted activity, they must look toward group action and that mere ''griping'' is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964), and its progeny.

I find that Friedman was engaged in concerted activity when she participated in the discussions leading up to the meetings in Florida, prepared the agenda for that first meeting and participated in the meetings. The concerns identified in the prepared agenda and expressed by the musicians at the meetings clearly relate to their wages, hours, and working conditions. I also find that Friedman's protest of Kay's call for his own meeting with the band immediately after the rehearsal in Florida was also concerted. Her complaint, made in a group setting in response to a demand made on the group implicitly enlisted the support of her fellow musicians. *Whitaker Corp.*, 289 NLRB 933 (1988). Accord: *Imaging & Sensing Technology*, 302 NLRB 531 (1991). Moreover,

[9] 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985), reaffd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[10] *Every Woman's Place*, 282 NLRB 413 (1986).

[11] *Oakes Machine Corp.*, 288 NLRB 456 (1988).

[12] *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), enfd. 853 F.2d 966 (1st Cir. 1988); *Circle K Corp.*, 305 NLRB 932 (1991).

Kay's testimony that he called the meeting to clear the air because of ''dissension'' in the band and his admission that he considered ''releasing'' Friedman from the band because of events in Florida establish that Respondent was aware of the concerted nature of Friedman's activities. While it is true that no group action resulted from the band meetings in Florida, it is clear from the agenda prepared in advance, as well as the suggestion to circulate a petition, which was rejected by the employees, that the objective of the meeting was group action. The fact that attempts to induce group action were unsuccessful does not change the concerted nature of the activity. *El Gran Combo*, supra. Had Respondent terminated Friedman after the Florida tour, there would be no doubt of a violation. However, as Respondent points out, Friedman continued to be called for every gig through the remainder of 1994, despite her concerted activities and Kay's animus toward such activities. It was not until she wrote the January 4 letter, almost 8 months later, that her relationship with Respondent ended.

Friedman's January 4 letter to Kay is ambiguous as to whether it was written with the authorization, or on behalf, of other employees. Although Friedman told McSweeney and Terry that she would be writing such a letter, there is no evidence that Respondent was aware of these conversations. In the body of the letter, Friedman uses the word ''we'' and cites concerns that do not ''sit well with the band,'' including topics of general concern such as pay, rehearsals, and travel arrangements. However, she also makes personal demands, i.e., that she be first call on all gigs through the remainder of the year and that she be given an extended solo per set. Moreover, she specifically states in the letter that ''It's between you and me'' and requests that Kay sign the letter as a condition for her to play with the band in California. She wishes Kay luck with the band if ''you decide this is to much for you.'' In the same paragraph, she states, ''We must be able to speak out or this band full of women will be taking the meek role that women have always been expected to take'' and that, if Kay accepts her letter, ''we will be treated as well as possible and like the professionals we are.''

Respondent argues that Friedman's letter was a personal demand and not an expression of protected concerted activity and that, even if Friedman were engaged in protected concerted activity when she wrote the letter to Kay, Respondent did not discharge her. Respondent relies on the language in her letter indicating that she no longer wished to perform with the band if Kay could not meet her demands. The last paragraph of Friedman's letter suggests that she would not go to California with the band if Kay did not sign and return her letter. Similarly, her statement, ''If you decide this is to much for you, then I wish you great luck with the band,'' implies an intent to resign absent acceptance of her demands. A reasonable person reading this letter could conclude that Friedman no longer wished to perform with the band unless Respondent, through Kay, acceded to her demands. Friedman faxed her letter to Kay on the day employees were expected to return the signed ''Agreement'' for the California tour which had been distributed on New Year's Eeve. Since she did not return the signed agreement, the letter could reasonably be interpreted as her counterproposal for an individual agreement, which Respondent would be free to reject.

Unfortunately for Respondent, however, any ambiguity in the letter was resolved the next day when Friedman spoke to Kay about the letter. I credit Friedman's version of this conversation because Kay did not specifically contradict her testimony regarding the details of the conversation and because he admitted on cross-examination that he told her he did not understand her letter and refused to discuss it and ''as far as he was concerned, it's over.'' In this conversation, Friedman clearly acted as a spokesperson for the other musicians, asking him about rehearsals, meetings, and the travel arrangements in Los Angeles and telling him that the other musicians were scared to talk to him about these things. Kay told Friedman she'd been a problem since the beginning, an obvious reference to the dissension on the Florida tour. Kay echoed this comment to other band members on the way to Los Angeles, telling McSweeney he was happy to have Friedman gone. As noted above, Kay never denied making these comments. Respondent clearly was aware of the concerted nature of Friedman's activity as a result of this conversation.

The Board and the courts have held that the test of whether an employee was discharged depends upon the reasonable inferences that the employees could draw from the language used by their employer. *NLRB v. Downslope Industries*, 676 F.2d 1114 (6th Cir. 1982); *Quality Pallet Systems*, 287 NLRB 1192 (1988).[13] Immediately on learning that Kay would not sign the letter and that she would be replaced for the California tour, Friedman called Kay and attempted to negotiate with him by asking which of her demands he could not meet. It was Kay who refused to discuss the letter and told Friedman ''it's over.'' Moreover, Friedman has never been called again to perform with the band, contrary to the testimony of Kay and Maricle that a musician could decline a gig and be called for future gigs. As noted above, Friedman's name is still on Respondent's roster of available musicians. The finality of Kay's statement ''it's over'' could reasonably lead Friedman to believe she'd been fired, particularly when said in response to her attempt to discuss the points raised in her letter. The fact that she filed the underlying unfair labor practice charge a little over a month after this conversation is inconsistent with an intent to resign. Accordingly, it is found that Friedman was discharged on January 5, 1995.[14]

Finally, based on Kay's comments to other band members during the trip to Los Angeles, that he was glad to have Friedman gone and that she complained and demanded too much, it is found that Friedman's discharge would be unlawful even if her letter could reasonably be interpreted as an

[13] The the General Counsel has cited cases holding that a refusal to rehire or allow an employee to withdraw a resignation may violate the Act if motivated by the employee's Sec. 7 activity. *Aero Industries*, 314 NLRB 741 (1994); *EDP Medical Computer Systems*, 284 NLRB 1232 (1987). Friedman's attempts to discuss her letter with Kay, in response to the message left on her answering machine, constitute an effort to preserve her employment relationship with Respondent and do not evidence an intent to resign.

[14] This finding is not meant to suggest that Respondent was obligated to agree to Friedman's demands. Rather, by refusing to discuss them and telling her ''it's over,'' Respondent effectively terminated Friedman for making the demands. Significantly, Kay did not give Friedman the option of working under current conditions when she called him on January 5. *Quality Pallet Systems*, supra.

individual rather than concerted act, because such a statement, in the context of the earlier activity in Florida, would tend to chill other employees in the exercise of their right to engage in concerted activities. See *Ewing v. NLRB*, 861 F.2d 353, 361–362 (2d Cir 1988); *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1003 fn. 2 (1st Cir. 1988).

Based on the above and the record as a whole, I find that Respondent terminated Friedman on January 5, 1995, because she engaged in concerted activities with other employees of Respondent for their mutual aid and protection and to deter other employees from engaging in similar activities, thereby violating Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Charging Party, Janice Friedman, was at all times material an employee within the meaning of Section 2(3) of the Act.

3. By terminating Friedman for engaging in concerted activities protected by Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged an employee, it must offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]